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OCTOBER TERM, 1956

No. 208

J. A. HERZOG, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL MEMORANDUM

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PETITIONER'S SUPPLEMENTAL MEMORANDUM

This memorandum is filed for the sole purpose of calling the Court's attention to a recent decision of the Second Circuit, *United States* v. *H. J. K. Theatre Corp. et al.*, decided on August 20, 1956.

That decision, set out in pertinent part in the Appendix hereto, *infra* pp. 1a-4a, is directly contrary to the decision of the court below in this case on the question of the right of a defendant to use a witness's Grand Jury testimony for purposes of impeachment. See the opinion below in Appendix A to the present petition, pp. A5-A7.

1. The Second Circuit held (p. 2a *infra*) that "The proper procedure is for the trial judge to read the Grand Jury minutes to determine whether the witness' trial testimony is contradictory; if it is, the judge should disclose to defendant the part of the witness' Grand Jury testimony which contradicts the trial testimony; and if not, and if the defendant so requests, the judge should seal the witness' complete Grand Jury testimony and make it part of the record on appeal."

The court below, on the other hand, held (Pet. App. A7) that "to ask a trial judge to inspect the transcript and then make known to the parties whether in his opinion *any* statements of a witness before the grand jury contradict *any* statements the witness made during the trial" is "Not only * * * a 'fishing expedition', but the judge is chumming the fish for the fisherman. For the judge to act as associate counsel in this manner is contrary to every concept of proper judicial functions."

It would be difficult to imagine more directly contradictory concepts of a federal trial judge's proper duty.

2. The Second Circuit also squarely held, rejecting the Government's contention to the contrary (in that case as well as here, see Br. Op. 12-15), that (note 7 of its opinion, p. 2a, *infra*) it is not necessary, "before a defendant may even inspect a witness' contrary Grand Jury testimony, he must lay a foundation similar to that required before he introduces into evidence prior inconsistent statements." Such a foundation, the Second Circuit went on to hold (*id.*), is required only when the contradictory statements are sought to be introduced in evidence.

Here again, this holding is directly in conflict with the views of the Ninth Circuit as to the foundation required before inspection of the Grand Jury minutes may be had (Pet. App. A6-A7), and is also at variance with the ruling of the First Circuit in *Scanlon* v. *United States*, 223 F. 2d 382, 385-386.

3. The Second Circuit also held, following its earlier decisions, that (p. 2a, *infra*) "where, as here, it is shown or alleged that the trial testimony of a witness against the defendant is contradictory of the witness' testimony before the Grand Jury, the rule in this circuit is that the defendant must be permitted to use the contradictory Grand Jury testimony to impeach the witness." This, of course, is likewise squarely contrary to the holding of the Ninth Circuit in this case (Pet. App. A5-A7).

4. If the Second Circuit's rule, that it is a sufficient basis for inspection of a witness' Grand Jury testimony that "it is shown or alleged" that such testimony is contradictory (*infra*, p. 2a), is to be regarded as law, then it is unnecessary to examine the Government's argument here (Br. Op. 14) that "Petitioner's assertion (Pet. 11) that the trial testimony of both Douglass and Cline was impeached by their pre-trial statements to the Treasury agents is without support in the record."

Petitioner set out in Appendix D to the petition herein (Pet. App. A33-A36) the significant respects in which both Douglass and Cline had already been impeached prior to his request for inspection of their Grand Jury testimony. If, under any view of the case, that question must be resolved, then we are confident that the record references collected in Appendix D amply support petitioner's assertion and demonstrate

as well that the Government's statement to the contrary constitutes an instance of the triumph of advocacy over accuracy.

5. The Second Circuit's *H. J. K. Theatre Corp.* decision (*infra,* pp. 1a-4a) underscores what the Circuit Justice said in February 1955 when he admitted the present petitioner to bail pending appeal (99 L. Ed. at 1303; 75 S. Ct. at 353):

> "* * * Herzog's request for inspection of the grand jury minutes would have been treated differently in New York than it was in California. Which is the better way of handling the matter, or whether there is still another which is to be preferred, is a considerable question in the administration of justice."

We accordingly urge that the *H. J. K. Theatre Corp.* case, which demonstrates the continuing importance of that question, additionally emphasizes the need for reviewing the contrary ruling below in the present cause.

Respectfully submitted.

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SEPTEMBER 1956.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 392—October Term, 1955.

(Argued June 8, 1956 Decided August 20, 1956.)

Docket No. 24001

UNITED STATES OF AMERICA, *Appellee*,

v.

H. J. K. THEATRE CORPORATION, JEANNE ANSELL, and IRVING A. ROSENBLUM, *Appellants*.

* * * * * *

Before: FRANK, HINCKS and WATERMAN, *Circuit Judges*.

* * * * * *

FRANK, *Circuit Judge*:

* * * * * *

3. Rosenblum's only additional contention is that the trial judge erred in restricting his attorney's access to the Grand Jury testimony of Ansell and in limiting the use of the disclosed Grand Jury testimony in his cross-examination of Ansell. After the Government had used Miss Ansell's Grand Jury testimony to impeach her,[6] Rosenblum's counsel asked to see the remainder of Ansell's Grand Jury testimony in order to impeach her. We do not think that he was entitled to have access to all of her testimony.

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[6] It is suggested that the Government, by using a portion of the Grand Jury minutes to impeach Ansell, waived its privilege to keep the balance secret. See *United States* v. *Krulewitch*, 145 F. 2d 76, 79 (C. A. 2); *United States* v. *Beckman*, 155 F. 2d 580, 584 (C. A. 2). We leave that question open.

However, where, as here, it is shown or alleged that the trial testimony of a witness against the defendant is contradictory of the witness' testimony before a Grand Jury, the rule in this circuit is that the defendant must be permitted to use the contradictory Grand Jury testimony to impeach the witness. The proper procedure is for the trial judge to read the Grand Jury minutes to determine whether the witness' trial testimony is contradictory; if it is, the judge should disclose to defendant that part of the witness' Grand Jury testimony which contradicts the witness' trial testimony; and if not, and if the defendant so requests, the judge should seal the witness' complete Grand Jury testimony and make it part of the record on appeal.[7]

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[7] *U. S.* v. *Alper*, 156 F. 2d 222, 226 (C. A. 2); *U. S.* v. *Lebron*, 222 F. 2d 531, 536 (C. A. 2); *U. S.* v. *Cohen*, 145 F. 2d 82, 92 (C. A. 2); *U. S.* v. *Krulewitch*, 145 F. 2d 76, 78 (C. A. 2); *U. S.* v. *De Normand*, 149 F. 2d 622, 625-626 (C.A. 2); *U. S.* v. *Beckman*, 155 F. 2d 580, 583-584 (C. A. 2).

The Government contends that *Remington* v. *United States*, 191 F. 2d 246, 261 (C. A. 2) should be construed to hold that, before a defendant may even inspect a witness' contradictory Grand Jury testimony, he must lay a foundation similar to that required before he introduces into evidence prior inconsistent statements. This interpretation of *Remington* we think is not warranted. Since the *Krulewitch* case, *supra*, which the Court cited in *Remington*, held precisely the opposite, and since the *Cohen* case, *supra*, also cited by the Court, contains no indication of such a requirement, we are loath so to interpret *Remington* so as to require this foundation. No other case in this circuit has imposed this additional requirement for the mere disclosure (as opposed to use as evidence) of contradictory Grand Jury or other privileged testimony. Of course, if a defendant seeks to introduce the contradictory statements in evidence, he must lay a proper foundation. McCormick, Evidence (1954), Section 37.

In any event, in this case, the trial judge made it impossible for Rosenblum's attorney to lay the foundation apparently required by *Remington*, since he very clearly ruled that Rosenblum's attorney was to limit his cross-examination concerning Ansell's Grand Jury testimony to only the two matters touched upon by the Government in its cross-examination of Ansell.

The trial judge in this case did not follow this procedure. Instead, he ruled that he would read into the record only that portion of Ansell's Grand Jury testimony which related to two matters on which the Government had cross-examined her, i.e., (1) her claim that she thought that the tax returns filed were only for part payment, and (2) the monthly tax summaries. However, the testimony actually read into the record also revealed (3) that Rosenblum had set up a separate tax account, and (4) that Ansell had given the tax figures to Rosenblum who made out the tax returns. In addition, Block [Rosenblum's attorney, who had been attorney for both Ansell and Rosenblum at the time Ansell appeared before the Grand Jury] had a copy of a prepared statement that Ansell had read to the Grand Jury.

The trial judge also ruled that he would limit Block's cross-examination of Ansell with respect to her Grand Jury testimony to only the two matters brought out by the Government in its cross (i.e., points (1) and (2) *supra*). He so ruled after Ansell's counsel objected to the cross-examination of his client by Block (who had represented her at the time of the Grand Jury hearing).

We think that Rosenblum's attorney was entitled to have all of Ansell's contradictory Grand Jury testimony read into the record and that he was entitled to cross-examine her concerning this testimony free from the limitations imposed by the trial judge. Statements made to a Grand Jury are not confidential communications which come within the attorney-client privilege. McCormick, *supra*, Sections 93, 95; 8 Wigmore, Evidence, Section 2311. The modern justification of the privilege is that it encourages full disclosure by a client to his lawyer and thereby promotes the interest of justice. 8 Wigmore, *supra*, Section 2291; McCormick, *supra*, Section 91. This purpose is not furthered by restricting an attorney's access to and use of Grand Jury testimony by a former client.

However, after examining the Grand Jury testimony by Ansell, which was sealed and made part of the record on appeal, and after comparing it with the trial testimony, we think that all the points in Ansell's Grand Jury testimony, which contradicted her trial testimony and which supported Rosenblum's defense, were adequately brought out at the trial. * * * We are satisfied that the unrevealed portion of Ansell's Grand Jury testimony contained nothing which would have added weight to the impeachment of her trial testimony touching Rosenblum, impeachment already accomplished by that portion of her Grand Jury testimony which was read to the trial jury at the Government's behest. Thus the effect of the rulings made was not to leave her trial testimony against Rosenblum unimpeached. When her trial testimony as to a particular fact had been impeached by one passage in her prior testimony, we think it lay within the trial court's discretion to prevent, as unduly time-consuming and unimportantly cumulative, an inspection of, and cross-examination on, other passages in her previous testimony given as to the same matters on the same occasion before the Grand Jury. Indeed, the verdict against Ansell imports that the jury rejected her trial testimony to the effect that Rosenblum was solely to blame. This accomplished, further impeachment of her trial testimony could scarcely have affected the verdict against Rosenblum.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 208

J. A. HERZOG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is filed in response to Petitioner's Supplemental Memorandum, which invited the Court's attention to the decision of the Court of Appeals for the Second Circuit in *United States* v. *H. J. K. Theatre Corp. et al.*, decided August 20, 1956.

Petitioner argues, with respect to the question whether the trial court erred in denying petitioner's request to inspect the minutes of the grand jury testimony of two Government witnesses (the first question presented by the petition for certiorari), that the decision of the Second Circuit in the *H. J. K. Theatre Corp.* case is in conflict with that of the Ninth Circuit

in the instant case. It is certainly true that, taken literally, the language of Judge Frank's opinion (Pet. Supp. Memo. 2a) seems to announce a general rule in the Second Circuit that the mere unsupported allegation that a witness's trial testimony is contradicted by the testimony he gave before the grand jury suffices, without more, to require the trial judge to read the grand jury's minutes to determine whether the alleged inconsistency in fact exists. If that is now the rule in the Second Circuit, it undoubtedly represents a change from what was generally understood, we believe, to be the rule in that circuit as well as in other circuits. See Brief in Opp. pp. 12–15; and cf. cases cited in fn. 7 of Judge Frank's opinion (Pet. Supp. Memo 2a). To that extent there is a conflict between the approach taken by the Second Circuit in the *H. J. K. Theatre Corp.* case and that expressed by the Ninth Circuit in the opinion below (App. A to petition for certiorari, pp. A6–A7):

> Surely there is at least as great a need for laying a foundation before invading the secrecy of grand jury proceedings, as would ordinarily be required before permitting the examination of statements and reports in the possession of the prosecutor. A trial court unquestionably has the power, under Rule 6 (e) of the Federal Rules of Criminal Procedure, to order grand jury proceedings transcribed and produced for inspection by the defendant but such power should be exercised only where there is a clear showing that the ends of justice require it. * * *
>
> * * * The person requesting the inspection should be required to specify the particular

statements he is seeking for impeachment purposes. It is one thing to ask a trial judge to inspect the transcript of grand jury proceedings to determine whether a witness there testified he spent the month of July in Alaska, or that he had a gun in his possession on a certain occasion, or that he rode on a white horse in a parade. It is an entirely different matter to ask a trial judge to inspect the transcript and then make known to the parties whether in his opinion *any* statements of a witness before the grand jury contradict *any* statements the witness made during the course of the trial. Not only is the latter course a "fishing expedition", but the judge is chumming the fish for the fisherman. For the judge to act as associate counsel in this manner is contrary to every concept of proper judicial functions.

We think it appropriate to add, however, that in the instant case the court below explicitly put to one side the question whether the trial judge should have himself inspected the grand jury testimony (*id.*):

> * * * In the instant case the trial judge was not requested to inspect the grand jury testimony. Appellant's request was that the testimony be produced for the appellant's (not the trial judge's) inspection. We are not to be understood as saying that it would have been error to refuse such a request had it been made. * * *

In the case at bar neither of the witnesses whose grand jury testimony the defendant sought to examine were questioned during cross-examination with respect to any contradictory statements they might have uttered before the

grand jury, nor was it suggested to the court what contradictory statements the defendant hoped to find. There was no attempt to lay a foundation of any kind and the trial court did not err in denying the appellant's request.

Moreover, in the *H. J. K. Theatre Corp.* case the Court of Appeals pointed out that the Government had itself used the witness's grand jury testimony to impeach her, prior to defendant's request to see the remainder of her grand jury testimony. Although the Second Circuit expressly left open the question whether the Government had thereby "waived its privilege to keep the balance [of her grand jury testimony] secret" (Pet. Supp. Memo 1a, fn. 6), a distinction might be drawn between such a situation and the one in the instant case, where the Government had not itself used the grand jury minutes.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

OCTOBER 1956.

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